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82-440

IN THE

Supreme Court of the United States

OCTOBER 1982 TERM

In re FARMERS UNION CENTRAL EXCHANGE, INC.; FARMERS PETROLEUM COOPERATIVE, INC.; FCX, INC.; LANDMARK, INC.; LAND O'LAKES, INC.; MIDLAND COOPERATIVES, INC.; MFA OIL COMPANY; and TENNESSEE FARMERS COOPERATIVE,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Did the Bankruptcy Court exceed its constitutional authority by continuing to assert jurisdiction over state-law claims after this Court held that "the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim"? *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2880 n.40 (1982).

LIST OF PARTIES

In addition to the eight petitioners listed in the caption, the parties to the litigation below were Energy Cooperative, Inc.; the Algerian national petroleum company, Societe Nationale Pour La Recherche, La Production, La Transport, La Transformation Et La Commercialisation Des Hydrocarbures ("Sonatrach"); and the seven banks listed below:

1. Continental Illinois National Bank and Trust Company of Chicago
2. Seattle First National Bank
3. First National Bank of Minneapolis
4. First National Bank and Trust Company of Oklahoma City
5. Bank of Montreal (California)
6. First National Bank of Boston
7. St. Louis Bank for Cooperatives.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit denying the Petition for a Writ of Mandamus is unreported; it is reproduced in the Appendix attached hereto at page 1a. The opinion of the Bankruptcy Court for the Northern District of Illinois denying petitioners' motion to dismiss or stay proceedings is also unreported; it is reproduced in the Appendix at page 4a.

JURISDICTION

The Court of Appeals' entered judgment denying the Petition for a Writ of Mandamus on August 13, 1982, 22 days after the Bankruptcy Court denied petitioners' motion to dismiss or stay proceedings for lack of jurisdiction on July 22, 1982.

This Court has jurisdiction over the petition for a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651(a). This Court also has jurisdiction under 28 U.S.C. § 1254(1) to treat the petition as one for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. *See Collier* v. *United States*, 382 U.S. 890 (1965), 384 U.S. 59 (1966); *Schlageshauf* v. *Holder*, 379 U.S. 104, 109 (1964).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1 of the Constitution:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

28 U.S.C. § 1471 (1976 ed., Supp. III), added by Section 241(a) of the Bankruptcy Act of 1978, Pub. L. 95-598, 92 Stat. 2549:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

The All Writs Act, 28 U.S.C. §1651(a):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

Petitioners seek a writ of mandamus directing the Honorable Frederick J. Hertz of the United States Bankruptcy Court for the Northern District of Illinois to dismiss the complaints brought against petitioners on the grounds that the Bankruptcy Court's jurisdiction over such state-law claims violates Article III of the Constitution.

The eight petitioners are each agricultural cooperatives, and they are referred to in this litigation as the "Member-Owners."[1] In 1976, they formed Energy Cooperative, Inc. ("ECI"), which purchased an oil refinery in East Chicago,

[1] Pursuant to Supreme Court Rule 28.1, petitioners state that none of them has a parent corporation, subsidiary (other than wholly owned subsidiaries) or affiliate, except for the following corporations: Landmark Commodities, Inc., Select Seeds, Inc., Silver Grove Fleeting, Inc., Imperial, Inc., Imperial Packaging, Inc., and Lea Foods, Inc.

Indiana. On May 15, 1981, ECI filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.*, in the Bankruptcy Court for the Northern District of Illinois. ECI subsequently commenced an adversary proceeding in that Court against the Member-Owners, seeking to recover $164,403,000 for an alleged breach of a stock subscription agreement governed by state law. Seven banks that had provided secured loans to ECI intervened as plaintiffs in that action, and their Amended Complaint against the Member-Owners seeks $257,171,814.89 under several theories, all arising under state law. ECI and the banks also commenced an adversary proceeding against a number of ECI's suppliers. One of those suppliers, the Algerian national petroleum company known as "Sonatrach," brought a counterclaim against ECI and the banks, demanding over $20,000,000 in compensatory damages for willful and fraudulent misconduct. The banks thereupon brought a third party complaint against the Member-Owners seeking common-law indemnity for any liability the banks might incur to Sonatrach.

In December 1981, the Member-Owners moved to dismiss the actions then pending on the grounds that 28 U.S.C. § 1471 unconstitutionally vested jurisdiction over these claims in bankruptcy judges who do not have life tenure and who are not appointed pursuant to Article III of the Constitution.[3] Bankruptcy Judge Hertz denied that motion in January 1982.

Following this Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858

[3] Pursuant to Supreme Court Rule 28.4(b), petitioners state that 28 U.S.C. § 2403(a) may be applicable and that the Bankruptcy Court certified that fact to the Attorney General on December 11, 1981.

(1982), the Member-Owners renewed their motion to dismiss and sought, in the alternative, that the proceedings be stayed. Judge Hertz denied that motion (Appendix, p. 4a) on the basis of a "General Order" issued by the District Court for the Northern District of Illinois, which stated:

> GENERAL ORDER
>
> Upon review of the opinion of the Supreme Court in the case of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co., et al.*, No. 81-150, and with particular reference to the case of *Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976), cited therein as expositive of the meaning of the order staying the Court's judgment until 4 October 1982, it is the view of this court that for the period of the stay the *Marathon* case does not affect the jurisdiction of the bankruptcy court. It is further the opinion of this court that no stay of any proceedings in the bankruptcy court prior to 4 October 1982 is warranted by the *Marathon* decision. . . . (Appendix, p. 7a).

The Member-Owners then filed a Petition for a Writ of Mandamus in the Seventh Circuit. The Court of Appeals denied the petition on August 13, 1982, finding "that there has been no abuse of discretion on the part of Judge Hertz of the Bankruptcy Court" in continuing to exercise jurisdiction.[2] (Appendix, p. 3a).

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[2] After filing the mandamus petition in the Seventh Circuit, the Member-Owners filed an Application for Leave to Appeal in the District Court pursuant to Section 405(c) of the Bankruptcy Act of 1978. Inasmuch as the District Court had already expressed its views in the General Order, the purpose of this interlocutory appeal was to provide an alternative avenue of review by the Seventh Circuit. Plaintiffs have opposed petitioner's request for interlocutory review, and the District Court has neither considered the application nor decided whether it will allow an appeal.

REASONS FOR GRANTING THE WRIT

Although six Justices of this Court agreed in *Northern Pipeline* that bankruptcy judges cannot constitutionally hear state-law claims brought against third parties, a number of federal courts around the country, including the court below, have authorized continued jurisdiction over such cases.[4] They have reasoned that when this Court granted a "limited stay" of its judgment until October 4 to avoid "impairing the interim administration of the bankruptcy laws," it issued an affirmative command to the Bankruptcy Courts that they should put aside the requirements of Article III, at least until October 4, and exercise the full range of jurisdiction conferred by 28 U.S.C. § 1471, *including jurisdiction over state-law claims having nothing to do with the administration of any provision of the Bankruptcy Code.*

To compel obedience to the Constitution, this Court should issue a writ of mandamus requiring dismissal of the

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[4] *See In re Otero Mills*, No. 82-00217 M.L., CCH Bankr. L. Rep. ¶ 68,754 (Bankr. D.N.M. July 14, 1982); *In re O.P.M. Leasing Services, Inc.*, No. 81-B-10533, CCH Bankr. L. Rep. ¶ 68,753 (Bankr. S.D.N.Y. July 16, 1982); *In re Cherry Pond Coal Co.*, No. 82-2317 (S.D.W.Va. July 22, 1982), *rev'g sub nom. Armco, Inc.* v. *Cherry Pond Coal Co.*, No. 81-20504, CCH Bankr. L. Rep. ¶ 68,755 (Bankr. S.D.W.Va. July 16, 1982).

On the other hand, the Bankruptcy Court for the District of Minnesota (which originally heard the *Northern Pipeline* case) has stayed all "nonbankruptcy law" proceedings. (Appendix, p. 8a). Similarly, in *In re Southern Distilleries*, No. 82-00312 (Bankr. M.D.Ala. July 22, 1982), the Bankruptcy Court abstained from hearing a case that could be brought in state court: "If there is jurisdiction in this court, the court feels that, in light of the *Northern Pipeline* decision, if should be exercised only under the most extraordinary circumstances. . . . The issue presented here is obviously cognizable by the state court and should be decided there. If this court has jurisdiction, which is doubtful, it abstains."

state-law claims which the Bankruptcy Court has no constitutional authority to hear. Allowing such litigation to proceed will only lead to uncertainty, delay and more litigation. Any judgment rendered by the Bankruptcy Court may be subject to appeal for lack of jurisdiction.[8] Indeed, any action taken by the Bankruptcy Court during the course of the litigation may be subject to reconsideration if the case ultimately comes before a court of competent jurisdiction. These problems, moreover, will only worsen if the Court extends the stay beyond October 4 because of inaction by Congress. In short, both the command of the Constitution and the interests of sound judicial administration dictate that state-law claims should be dismissed sooner rather than later.

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[8] In *Northern Pipeline*, the Court said "our decision today shall apply only prospectively." 102 S.Ct. at 2880. The meaning of "prospectivity" in the jurisdictional context is well established: a judgment which has become final cannot be challenged *collaterally* but it can be challenged on direct appeal. In other words, when a restriction on jurisdiction is applied "prospectively," it applies to all pending cases, including those on appeal. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 376-77 (1940) (Supreme Court decision holding unconstitutional the bankruptcy courts' jurisdiction to adjust municipal debts cannot be invoked once a judgment has become final, but can be raised on appeal from the judgment); *Smallwood* v. *Gallardo*, 275 U.S. 56, 61 (1927) (Holmes, J.) ("To apply the [new restriction on jurisdiction] to present suits is not to give it retrospective effect"); *Baltimore & Potomac R. Co.* v. *Grant*, 98 U.S. 398, 401 (1879) (applying a new restriction on jurisdiction to pending cases "is undoubtedly prospective in its operation," for it "destroys no vested rights" and "does not set aside any judgment already rendered"); *Goss* v. *Mayden*, 413 U.S. 665, 671-72 n.5 (1973) (Supreme Court decision holding unconstitutional the jurisdiction of military courts to try certain offenses cannot be invoked in a collateral challenge to a conviction, but all convictions not yet final must be vacated).

I. This Court Did Not "Suspend" The Constitution By Staying Its Judgment

The "limited stay" which this Court granted in *Northern Pipeline* has been interpreted in two ways. Some authorities have reasoned that this Court "stayed . . . the finding of unconstitutionality" until October 4,[6] and on that basis have concluded that bankruptcy judges should exercise the full range of jurisdiction conferred by the Bankruptcy Act, without regard to whether such jurisdiction is permitted by the Constitution.[7] The opposing view is that the Constitution must be upheld, and that bankruptcy judges are therefore precluded from exercising jurisdiction over state-law claims; they can, however, continue with "the interim administration of the bankruptcy laws" in accordance with the stay granted in *Northern Pipeline*, 102 S.Ct. at 2880.

The courts that are allowing continued jurisdiction over state-law claims have failed to distinguish between the *con-*

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[6] *In re O.P.M. Leasing Services, Inc.*, No. 81-B-10533, CCH Bankr. L. Rep. ¶ 68,753 at p. 81,022 (Bankr. S.D.N.Y. July 16, 1982).

[7] Indeed, such courts have treated the stay, not merely as a suspension of the finding of unconstitutionality, but as an instruction from this Court that they should *ignore* constitutional challenges to the statute conferring jurisdiction. In taking this approach, such courts have abdicated what *Marbury* v. *Madison* called "the very essence of judicial duty":

> "If both the law [conferring jurisdiction] and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. *This is of the very essence of judicial duty.*" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (emphasis added) (dismissing meritorious case because statute conferring jurisdiction violated Article III of the Constitution).

stitutional holding in *Northern Pipeline*—that "the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim"[8]—and the *statutory* holding invalidating all of 28 U.S.C. § 1471 because "the remaining grant of authority to Bankruptcy Courts" under § 1471 is "not readily severable." 102 S.Ct. at 2882 (concurring opinion). The entire statute was invalidated, not because the Court found "the remaining grant of authority" to be *unconstitutional*, but because it was unsure whether Congress would want to retain the existing Bankruptcy Court system if the judges could not hear the debtor's state-law claims. "We think it is for Congress to determine the proper manner of restructuring [bankruptcy jurisdiction] . . . in the way that will best effectuate the legislative purpose." 102 S.Ct. at 2880 n.40. In short, by invalidating the entire statute, *Northern Pipeline* allowed Congress to write on a clean slate; and by staying that judgment until October 4, the Court gave Congress time to act:

> "This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." 102 S.Ct. at 2880.

This Court should make it clear that the stay means what it says: it authorizes "the interim administration of the bankruptcy laws," not continued jurisdiction over state-law claims in violation of Article III. If the stay is confined to its terms, there is no constitutional problem; this Court undoubtedly has the authority to allow the *constitutional* portion of a statute to remain in effect while Congress is

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[8] 102 S.Ct. at 2880 n.40 (plurality opinion); *accord*, 102 S.Ct. at 2882 (concurring opinion) ("I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution").

deciding how to revise it. But the requirements of the Constitution cannot similarly be suspended. Although the Court has occasionally stayed the *remedy* for a constitutional violation, it has never "stayed . . . the finding of unconstitutionality." (See note 6, *supra*). For example, in the reapportionment cases, where the Court has generally allowed legislatures to continue sitting until the next scheduled election, the delay in imposing a *remedy* did not affect the *holdings* that the apportionments were unconstitutional. *See, e.g., Maryland Committee* v. *Tawes*, 377 U.S. 656, 675-76 (1964). It is well established that the laws passed by such a legislature are valid. *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976). But it is equally well established that the judgment of a court without jurisdiction cannot stand. Although such a judgment is protected by *res judicata* once it becomes final, if the court's jurisdiction is found to be unconstitutional while the case is still "open to direct review," any judgment must be vacated. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 376-77 (1940).

In sum, neither the language nor the logic of the *Northern Pipeline* decision justifies the conclusion reached below that Bankruptcy Courts should ignore the Constitution and continue exercising jurisdiction over state-law claims.

II. There Is No Need To Stay The Judgment Dismissing State-Law Claims

If the Constitution is obeyed and state-law claims are dismissed, they can immediately be re-filed in a state or federal court of competent jurisdiction.[9] Indeed, under the former Bankruptcy Act, the receiver or debtor-in-possession in a Chapter XI case could *only* bring state-law claims such

[9] Unlike cases brought under the Bankruptcy Code, which are within the *exclusive* jurisdiction of the Bankruptcy Courts, state-law claims can be litigated in state court. *Compare* 28 U.S.C. § 1471(a) *with* § 1471(b). Such claims, of course, can also be brought in the district court if diversity jurisdiction is present.

as these in state court (unless the defendant consented or there was an independent basis for federal jurisdiction). "The purpose . . . was to leave such controversies to be heard and determined for the most part in the state courts." *Schumacher* v. *Beeler*, 293 U.S. 367, 374 (1934). Requiring state-law claims to be litigated in state court will not impair "the interim administration of the bankruptcy laws," for, as *Northern Pipeline* made clear, the Bankruptcy Court's jurisdiction over such claims goes "far beyond that which can even arguably be characterized as merely incidental to the discharge in bankruptcy or a plan for reorganization." *Id.* at 2876 n.31 (plurality opinion). "[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights." *Id.* at 2871.

Thus, there is no reason to extend the *Northern Pipeline* stay if Congress fails to act by October 4. Not only are there alternative forums that can hear state-law claims, there are also alternative forums with jurisdiction to administer the bankruptcy laws. Under 28 U.S.C. § 1334, which remains in effect until April 1, 1984, the *district* courts "have original jurisdiction of . . . all matters and proceedings in bankruptcy."[10] They also have federal question jurisdiction with respect to all civil actions arising under the Bankruptcy Code. *See* 28 U.S.C. § 1331. Therefore, if the Court allows the stay to expire, the district courts will have full authority to entertain petitions under the Bankruptcy Code, to grant the remedies provided therein, and to administer estates. *See White* v. *Ewing*,

[10] After April 1, 1984, an amendment to § 1334 goes into effect which limits the district courts to appellate jurisdiction. *See* Sections 238(a) and 402(b) of the Bankruptcy Act of 1978. During the "transition period" between October 1, 1979 and April 1, 1984, the Act provides that the district courts' original jurisdiction is to be exercised by the Bankruptcy Courts, but of course that delegation of jurisdiction was invalidated in *Northern Pipeline*.

159 U.S. 36, 39-40 (1895) ("where an insolvent corporation is placed in the hands of a receiver of the Circuit Court, such appointment draws to the jurisdiction of that Court the control of its assets"). The district courts would not, however, have jurisdiction over state-law claims such as these, which do not involve property in the "actual or constructive possession" of the court.[11]

Thus, if Congress fails to act by October 4, 1982, and the *Northern Pipeline* stay expires in accordance with its terms, there will be no jurisdictional vacuum. State-law claims can be litigated in the state courts and, until April 1, 1984, bankruptcy matters can be heard in the district courts.

III. A Writ Of Mandamus Is Appropriate To Restrain The Unconstitutional Exercise Of Jurisdiction

This is a classic case for issuing a writ of mandamus: the issue presented is jurisdictional; it is a pure question of law; it calls for no appraisal of facts and no exercise of discretion; it is an issue of undoubted importance and urgency affecting thousands of cases around the country; and it is an issue that cannot await review through the normal channels of appeal and certiorari, for by then the damage will be done. Much litigation will have to be repeated in courts of competent jurisdiction.

The purpose of mandamus is to "afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction." *Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943). Indeed, that is "the traditional use of the writ . . . both at common law and in the federal courts." *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382 (1953); *Schlagenhauf* v. *Holder*,

[11] *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U.S. 426, 433-34 (1924); *Cline* v. *Kaplan*, 323 U.S. 97, 98 (1944).

379 U.S. 104, 109-10 (1964); *Will* v. *United States*, 389 U.S. 90, 95 (1967); *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976); *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 352 (1976); *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978).

In the present case, the writ should issue directly from this Court[12] in order to give an authoritative interpretation to *Northern Pipeline;* only this Court can "formulate the necessary guidelines in this area." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112 (1964). "This court has full power in its discretion to issue the writ of mandamus, . . . although the case is one in respect of which direct appellate jurisdiction is vested in [a lower] court, . . . where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken." *Ex parte Republic of Peru*, 318 U.S. 578, 584-85 (1943); *accord, Ex parte United States*, 287 U.S. 241, 248-49 (1932); *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701 (1927); *Maryland* v. *Soper*, 270 U.S. 9 (1926); *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945). "If it clearly appeared . . . that a practice had been adopted by district judges, as to the order or procedure in hearing causes, at variance with [this Court's] rules, our writ might well issue directly to such judges." *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, 706 (1927); *accord, Ex parte United States*, 287 U.S. 241, 249 (1932).

[12] If the Court decides not to grant a writ of mandamus, petitioners request that their papers be treated as a petition for a writ of certiorari to the Seventh Circuit. *See Collier* v. *United States*, 382 U.S. 890 (1965).

CONCLUSION

Because Article III of the Constitution prohibits bankruptcy judges from hearing state-law claims, this Court should issue a writ of mandamus directing the Bankruptcy Court to dismiss the complaints against petitioners.

Respectfully submitted,

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